SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000383-T
COURT OF APPEALS NO. 2014-CA-001076

GREATER CINCINNATI/NORTHERN KENTUCKY APARTMENT ASSOCIATION, INC. ET AL. — APPELLANTS

v.

ON APPEAL FROM
CAMPBELL CIRCUIT COURT, DIV. II
CASE NO. 13-CI-00956

CAMPBELL COUNTY FISCAL COURT ET AL. — APPELLEES

APPELLANTS' BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served via U.S. Mail, postage prepaid, this 26 day of January, 2015 on the following: Steven J. Franzen and Thomas Edge, Campbell County Attorney, 319 York Street, Newport, KY 41071; Robert E. List, Campbell County Attorney, 526 Greenup Street, Covington, KY 41011; Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Fred A. Stine, V, Judge, Campbell Circuit Court Division II, 330 York Street, Newport, KY 41071; and Taunya Nolan Jack, Clerk, Campbell Circuit Court, Campbell County Courthouse, 330 York St., Newport, KY 41071. I further certify that the record on appeal has been returned to the Campbell Circuit Clerk's office by counsel for Appellant.

COUNSEL FOR APPELLANTS

INTRODUCTION

Appellants are challenging Appellees' imposition of a flat fee upon occupied residential and commercial units to fund 911 emergency telephone services as exceeding Appellees' authority. Appellants seek a declaration that the ordinance imposing the fee is void *ab initio* because the Appellees lack the constitutional and statutory authority to impose such a fee.

STATEMENT CONCERNING ORAL ARGUMENT

This Court's order of September 18, 2014 directs that the case be scheduled for oral argument subsequent to briefing by the parties. Appellants agree that oral argument would the aid the Court's consideration of this case.

STATEMENT OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

Cities, counties and urban-county governments are permitted by statute to establish 911 emergency telephone service ("911 Service") individually or jointly. To fund 911 Service, the local authority is authorized to "levy ... any special tax, license, or fee ***not in conflict with the Constitution and statutes of this state***."[1] The statute expressly authorizes the levy of a subscriber charge on each telephone line (landline as opposed to wireless).

Historically, Campbell County (the "County") funded its 911 Service by imposing a monthly "E 911 service fee" of $3.00 per telephone line (landline as opposed to wireless) per month (the "Subscriber Charge").[2] The Campbell County Fiscal Court (the "Fiscal Court") concluded the Subscriber Charge was no longer adequate to fund the County's 911 Service because of the increasing replacement of landline telephones by wireless telephones and other technologies. As a result, on August 7, 2013, the Fiscal Court adopted Ordinance O-04-13 (the "Ordinance") replacing the Subscriber Charge with an annual $45.00 flat fee or charge on each occupied individual residential and commercial unit in the County (the "Property Charge"). The Ordinance amended Chapter 91 of the Campbell County Code of Ordinances by adding a new section 91.10, which reads:

> (A) For the purposes of this Chapter, a 911 service fee shall be defined as an annual fee of $45.00 imposed upon each occupied individual residential unit and each occupied individual commercial unit located upon each parcel of real property located within the County of Campbell, as

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[1] KRS § 65.760(3)(emphasis added).

[2] Record, p. 18 (hereinafter cited as "R. __.") (Ordinance, p. 1, cl. 3). Wireless telephones are subject to a state-level "Commercial Mobile Radio Service 911 Telephone Service Fee", and local governments are prohibited from levying a charge on wireless telephones. *See* KRS §§ 65.7621 *et seq.* and KRS § 65.7627.

determined from the records of the Campbell County Property Valuation Administrator's Office. A residential unit shall be defined as a principal residential space occupied or designed for occupancy for residential purposes. A commercial unit shall be defined as a principal non-residential building space of any size occupied or designed for occupancy by an individual non-residential business or public or private enterprise. A unit occupied as of November 1 shall be deemed occupied. A unit not occupied as of November 1 shall be deemed not occupied and shall not be subject to the 911 service fee.

(B) The 911 service fees collected shall be used for the delivery of Enhanced 911 emergency telephone service, as provided for by KRS 65.760.

(C) The 911 service fee shall be placed upon the Campbell County ad valorem property tax bills prepared by the Campbell County Clerk, pursuant to KRS 133.220(2) for the year beginning January 1, 2013 and continuing every year thereafter.

(D) For the year beginning January 1, 2013 only, owners of all occupied rental units shall be eligible to claim a credit of $22.50 per unit against the annual fee due. This credit, which is the equivalent [sic] a 6-months share of the fee, is granted to allow owners of rental property additional time to fully recover the amount of the fee from tenants. In subsequent years, the full amount of the annual 911 service fee shall be paid for all occupied units.

(E) The Fiscal Court shall by resolution appoint an Appeals Board to consider and resolve any claims of incorrect determination of occupied individual residential units or occupied individual commercial units.

(F) All 911 services fees shall be collected by the Campbell County Sheriff and transferred to the Campbell County Consolidated Dispatch Center on a timely basis, as determined by the Judge/Executive pursuant to Executive Order. The County Clerk and Sheriff shall be entitled to a reasonable fee to defray the actual costs of collection and disbursement of 911 service fees.

(G) The failure of any real property owner to pay the 911 service fee as set forth in this Chapter shall be punishable as a Class A misdemeanor.[3]

On September 12, 2013, Appellants filed suit in the Campbell Circuit Court seeking a declaration that the Ordinance is void *ab initio* because Appellees are without constitutional or statutory authority to levy the Property Charge. Appellants are owners of occupied individual commercial units and an individual residential unit in the County subject to the Ordinance and the Property Charge. Appellants contend that Appellees exceeded the authority granted to them by the Kentucky Constitution and Kentucky Revised Statutes by levying the Property Charge pursuant to the Ordinance.

On June 6, 2014, the Campbell Circuit Court issued an order upholding the Property Charge as a valid user fee (the "Opinion")(Exhibit A).[4] The Circuit Court held that a user fee need not be imposed on the actual use of a service, but a charge is valid if it merely confers a general benefit upon or funds a service available to the payor.[5]

Appellants timely appealed to the Kentucky Court of Appeals on July 2, 2014. On September 18, 2014, this Court granted Appellees' motion to transfer the case.

II. ARGUMENT

Local governments possess only those powers delegated by the Kentucky Constitution and the Kentucky Revised Statutes. Specifically, "county government in Kentucky is based on the premise that all power exercised by the fiscal court must be expressly delegated to it by statute."[6] Any doubt about the existence of a particular

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[3] R. 19 (Ordinance, p. 2, 91.10).
[4] *Greater Cincinnati/Northern Kentucky Apartment Assoc., Inc., et al. v. Campbell County Fiscal Court, et al.*, Campbell Circuit Court Case No. 13-CI-00956 (June 6, 2014), p. 9, R. 255 (cited as "Op. at __").
[5] R. 249 (Op. at 3).
[6] *Fiscal Court of Jefferson Cnty. v. City of Louisville*, 559 S.W.2d 478, 481 (Ky. 1977).

power is resolved against the existence of the power.[7] If a local government enacts an ordinance without authority or contrary to controlling law, the courts must declare the ordinance invalid.[8]

The Circuit Court failed to consider the Ordinance within the confines of the limited powers statutorily delegated to the County and misapplied Kentucky law. The County is authorized by KRS §§ 91A.510-.530 to impose user fees only on the user of a public service and only for the use of that service. The Property Charge satisfies neither statutory requirement. An occupied residential or commercial unit is not a user of 911 Services. A flat annual charge on a unit has no relation to the use of 911 Services. Because the Property Charge conflicts with KRS §§ 91A.510-.530, it is not a user fee but an unlawful tax and, therefore, the Ordinance is void *ab initio*.

A. The Circuit Court Decision is Contrary to Kentucky's User Fee Statute[9]

The Opinion erroneously concludes that the Ordinance imposes a lawful user fee and not an unconstitutional tax. There are four legally prescribed general methods by which the County and other political subdivisions in Kentucky may exact funds from their residents: [1] special assessments[10]; [2] regulatory fees and taxes[11]; [3] user fees[12];

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[7] *City of Horse Cave v. Pierce*, 437 S.W.2d 185, 186 (Ky. 1969); *see also Griffin v. Paducah*, 382 S.W.2d 402, 404 (Ky. 1964); *729, Inc. v. Kenton Cnty. Fiscal Court*, 515 F.3d 485, 494 (6th Cir. 2008)("only when a power is *expressly* granted to a county government may it exercise that power…")(emphasis in original).

[8] *City of Bowling Green v. Gasoline Marketers, Inc.*, 53 S.W.2d 281, 284 (Ky. 1976).

[9] This issue was preserved for review in the lower court in Appellants' pleadings and their brief in support of their motion for summary judgment and in opposition to Appellees' pleadings and brief. R. 111-114.

[10] "Special assessments" are governed by KRS §§ 91A.200-.290 and KRS §§ 107.010-.220.

[11] Regulatory fees are imposed pursuant to a delegated power to regulate.

[12] "User fees" are governed by KRS §§ 91A.510-.530.

and [4] revenue-raising fees and taxes[13] (which can only be ad valorem or license taxes).[14] A number of statutes grant local government the authority to levy fees for specific purposes.[15] The Circuit Court correctly held that with the exception of the Subscriber Charge expressly authorized in KRS § 65.760, "KRS § 65.760 does not enlarge the scope of local governments' revenue-raising power."[16] Therefore, the County, in replacing its Subscriber Charge, is limited to one of those four general methods for funding its 911 Service.

As conceded by Appellees and held by the Circuit Court, the Property Charge is ***not*** a special assessment, regulatory fee or tax, or revenue-raising fee or tax.[17] Instead, the Circuit Court found "the crucial issue presented by the parties is whether the Ordinance imposes a valid user fee."[18]

As the Circuit Court acknowledged, KRS § 65.760(3) authorizes the County to fund 911 Service through the levy of a tax, license or fee so long as the method used is

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[13] A county government's power to tax—and the limitations thereon—is addressed by Sections 171-174 and 181 of the Kentucky Constitution.

[14] R. 249 (Op. at 3); *City of Bromley v. Smith*, 149 S.W.3d 403, 405 (Ky. 2004); *Barber v. Comm'r of Revenue*, 674 S.W.2d 18, 20 (Ky. App. 1984), *disc. rev. den.* Sept. 6, 1984. Of course, local governments also may charge fees and receive compensation for the sale of franchises, the sale or rental of governmental property and may receive income from proprietary activities. *See Eastern Ky. Resources v. Arnett*, 934 S.W.2d 270 (Ky. 1996); KRS § 67.080(1)(b) and (s). Those types of revenues are not implicated here.

[15] *See, e.g.*, KRS § 220.215 (authorizing sanitation districts to charge a fee "to users in areas where facilities are to be acquired, constructed, or established...."); KRS § 281A.320 (authorizing a law enforcement agency to charge an applicant for a commercial driver's license a fee for processing a criminal background check); etc.

[16] R. 249 (Op. at 3).

[17] "The parties agree that the fee imposed by the Ordinance is not a special assessment, a regulatory fee, or an ad valorem or license tax." *Id. See also* R. 160 (Appellees' Circuit Court Brief, p. 9).

[18] R. 249 (Op. at 3).

"not in conflict with the Constitution and statutes of this state."[19] The County's authority to levy a user fee is governed by "statutes of this state" – KRS §§ 91A.510-.530. The Circuit Court acknowledged that "user fee" is statutorily defined in KRS § 91A.510, but failed to apply the definition or provide any analysis of the user fee statutes.[20] The Property Charge is a valid user fee only if it complies with these statutes and it clearly does not.

KRS § 91A.510 defines "user fee" as "the fee or charge imposed by a local government ***on the user*** of a public service ***for the use*** of any particular service not also available from a nongovernmental provider." (Emphasis added.) The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect.[21] To determine that intent, courts first look to the language of the statute and give the words their common meaning.[22] Only when the plain meaning of the statute's language is ambiguous will the court depart from a strict reliance on the words of the legislature.[23] By this statute, the legislature has authorized a "user fee" only "on the user" and only "for the use" of that service.

Plainly, KRS § 91A.510 authorizes a user fee only on a person or entity that actually uses the service for which the fee is charged. "User" is commonly defined as

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[19] *Id.* (quoting KRS § 65.760(3)).
[20] R. 250 (Op. at 4, fn. 6).
[21] *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009); *see also* KRS § 446.080(1).
[22] *See* KRS § 446.080(4)("All words and phrases shall be construed according to the common and approved usage of language …."); *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 740 (Ky. 2014); *Commonwealth v. McBride*, 281 S.W.3d 799, 806 (Ky. 2009)("Every term in a statute need not be defined, and terms that are not defined are to be accorded their common, everyday meaning.").
[23] *Darcy v. Commonwealth*, 441 S.W.3d 77, 84 (Ky. 2014).

"someone who uses a thing"[24] or "a person who uses or operates something."[25] "Use" is commonly defined as "the application or employment of something"[26] or to "take, hold, or deploy (something) as a means of accomplishing a purpose or achieving a result."[27] Thus, KRS § 91A.510 defines a user fee as "the fee or charge imposed by a local government on the user [someone who applies, employs or deploys] of a public service for the use [application, employment or deployment] of any particular service not also available from a nongovernmental provider." This definition requires that the user of the service actively *employ* the service and not merely have the service made available to them, or otherwise receive some sort of a general benefit from the fact the service exists. Classic examples of user fees are tolls for the use of roads and bridges, parking meter charges, sewer charges for the discharge of waste and waste collection fees for garbage collection.

Here, the County has chosen to create a classification of payors that is characterized by the fact that the payors own occupied residential or commercial units. However, neither such owners nor the occupants may be actual users of 911 Service. To be a true user fee, the Property Charge must be imposed for each use of 911 Service. Accordingly, the Property Charge does not comply with KRS § 91A.510 and cannot be sustained as a lawful user fee.

By ignoring the plain language of KRS § 91A.510, the Circuit Court not only misconstrued the statute, but also redefined and broadened "use" to mean the *conferring*

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[24] Black's Law Dictionary 1579 (8th Ed. 2004).
[25] New Oxford American Dictionary 1853 (2nd Ed. 2005).
[26] Black's Law Dictionary 1577 (8th Ed. 2004).
[27] New Oxford American Dictionary 1853 (2nd Ed. 2005).

of a general benefit or the *availability* of a public service.[28] No dictionary recognizes this as an additional meaning of the term "use." Even if it did, this Court would be required to reject it; Kentucky courts are required to construe statutes delegating powers strictly, not broadly, and must resolve all ambiguities against the existence of a delegated power.[29] Similarly, Kentucky courts "are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used"[30] and are "precluded from adding... terms or meaning to the plain language of the statute."[31] The Circuit Court's "definition" of "user fee" goes too far and applies an "uncommon" meaning to the terms in the statute. To reach the conclusion of the Circuit Court, the word "user" would have to be replaced with "recipient of a benefit" and "use" with "the availability of a benefit". This results in an improper addition and subtraction from the statutory language.

KRS § 91A.510 is clear, governs here, and mandates that the Ordinance and the Property Charge levied cannot be sustained as a valid user fee. A user fee may only be imposed for the *actual* use of a government service and upon the person *actually* using that service. The Ordinance does neither. As the County acknowledges and the Circuit Court found, the Ordinance imposes the Property Charge not for the *actual use* of a service, but rather for the mere *availability or general benefit* of the service.[32] Because the Property Charge satisfies neither requirement of KRS § 91A.510, the Ordinance is not

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[28] R. 254 (Op. at 8, fn. 24).
[29] See notes 6 and 7, *supra*. *See also Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 740 (Ky. 2014)(explaining that "[w]hen the undefined words or terms in a statute give rise to two mutually exclusive, yet reasonable constructions, the statute is ambiguous.").
[30] *Beckham v. Board of Education*, 873 S.W.2d 575, 577 (Ky. 1994).
[31] *Lindall v. Kentucky Ret. Sys.*, 112 S.W.3d 391, 394 (Ky. App. 2003).
[32] R. 254 (Op. at p. 7).

authorized by KRS § 65.760(3) which requires a fee for 911 Service to "*not* [be] in conflict with the Constitution and statutes of this state."[33] Accordingly, the Circuit Court must be reversed.

B. The Property Charge Is an Unlawful Tax and the Circuit Court Erroneously Distinguished *Bromley* and *Barber*

The courts in *Barber*[34] and *Bromley*[35] addressed flat charges levied on property to fund emergency services, like the Property Charge, and held such charges were unlawful taxes. The Circuit Court erroneously dismissed these cases, finding that "[n]either *Bromley* nor *Barber* directly evaluated whether the charges at issue were valid user fees."[36] The Circuit Court erred because *Barber* and *Bromley* directly address the scope of user fees and are controlling authority.

In *Barber*, the City of Silver Grove adopted an ordinance imposing a flat fee upon all improved real property within the city to fund fire protection services.[37] Referring to the fee as a "service charge", the court held the fee was unconstitutional because it did not fall within any authorized method for collecting funds from the city's residents.[38] The court stated that to be valid, the charge at issue "must either be an assessment or a service charge similar to those imposed for waste collection and other proprietary-type

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[33] Emphasis added. The Ordinance further violates KRS §§ 133.220 and 134.119 by requiring collection of the Property Charge on property tax bills. KRS § 133.220 permits the county clerk to prepare tax bills, and not user fee bills. If the Property Charge is not a tax, as conceded by the Appellees, then it may not be collected on property tax bills as required by the Ordinance. Furthermore, pursuant to KRS § 134.119, the sheriff is the collector of "all state, county, county school district, and other taxing district property taxes" but not user fees. *See* OAG 83-253 (garbage district service charges cannot be placed on property tax bills prepared by the county clerk and may not be collected by the sheriff).

[34] *Barber v. Commissioner of Revenue*, 674 S.W.2d 18 (Ky. App. 1984).

[35] *City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004).

[36] R. 250 (Op. at 4).

[37] *Barber*, 674 S.W.2d at 20.

[38] *Id.* at 21.

city services."[39] The court found the service charge, which was an annual, flat fee imposed on improved real property, was not a valid user fee because it was not reasonably calculated based upon *use* of fire protection services.[40] The court specifically distinguished the service charge at issue from user fees and found an indirect benefit was not enough to sustain the charge at issue as a user charge.[41] Because the charge was neither an ad valorem tax nor a license tax, the Court found the charge could not be sustained as a tax and held it void. Because the *Barber* court clearly considered user fees, the opinion in that case is directly applicable to the facts presented in this case.[42]

In *Bromley*, this Court similarly held that a flat charge of $60.00 on each residential and business unit within the city for life squad and other nonfire-related emergency services was not a valid user fee.[43] Relying upon the holding of the Court of Appeals in *Barber*, this Court explained that user fees are "for the provision of measurable services, such as waste collection and storm drainage, are not technically

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[39] *Id.*

[40] *Id.*

[41] *Id.* ("Fire protection is a governmental service from which all residents receive an indirect benefit but only a few residents will receive a direct service. It is not comparable to a sewer service charge which may be based on consumption [*i.e.*, use] or the amount of waste which might be reasonably calculated to be put into the system. It is also not like charges for solid waste disposal which may be based on a flat fee-per-stop or a minimum fee-per-customer with extra charges for extra volume at homes or commercial establishments.")

[42] The Circuit Court attempted to distinguish *Barber* because the statute at issue, KRS § 75.040 permitted the use of ad valorem taxes to fund the fire protection services. R. 250-251 (Op. at 4-5). This distinction is irrelevant because, KRS § 75.040 does not make taxation the exclusive method to fund fire protection services. *See, e.g., City of Bromley v. Smith*, 149 S.W.3d 403, 405 (Ky. 2004), noting that the "legislature has specified an ad valorem tax as a method of financing emergency ambulance services in KRS 75.040" but not finding a tax to be the exclusive method of financing. The city in *Barber* retained the authority to charge user fees to fund such services and most importantly, the court directly addressed the application of user fees.

[43] *Bromley*, 149 S.W.3d at 405.

considered taxes and are not part of this decision."[44] The Circuit Court misconstrued this language in finding that "the court focused its analysis on whether the nonfire-related emergency service charge was a valid tax."[45] But the *Bromley* court acknowledged local authority to impose user fees and expressly determined that a "flat-rate life squad tax … cannot be deemed to be either a license fee, special assessment *or user fee*."[46] The Court in *Bromley* not only ***did*** evaluate whether the charge at issue was a user fee, determining that a flat fee imposed on improved real property to fund emergency services could not be sustained as a user fee, but necessarily evaluated that charge under KRS § 91A.510 *et seq.* which governed the City's authority to impose user fees.

Like the flat fee fire protection service charge in *Barber* and the flat emergency services fee in *Bromley*, the flat-rate Property Charge imposed by the County is neither imposed on the user of 911 Service nor is it calculated based upon use of 911 Service. Accordingly, the Property Charge cannot be sustained as a valid user fee and must be declared void as in *Barber* and *Bromley*. The Circuit Court's failure to rule consistent with existing precedent was clear error and as such the Circuit Court's holding must be reversed.

C. The Circuit Court Erroneously Relied on Case Law Involving Charges Authorized by Other Statutes and Special Assessment Law in Upholding the Property Charge as a User Fee

The Circuit Court cited *Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District*[47] and *Kentucky River Authority v. City of*

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[44] *Id.* at 404.
[45] R. 250 (Op. at 4).
[46] *Bromley*, 149 S.W.3d at 405.
[47] 775 S.W.2d 520 (Ky. App. 1989).

Danville[48] as support for its finding that a valid user fee may be based upon the availability of a service or a conferred benefit.[49] But neither of these decisions construed the language or the authority delegated in the user fee statute (KRS §§ 91A.510 *et seq.*). The Circuit Court compounded its error by applying concepts from the law related to special assessments to these cases to justify the Property Charge as a user fee under KRS §§ 91A.510 *et seq*. A careful analysis of the holding in *Long Run* and *Kentucky River Authority* confirms that neither decision supports the Circuit Court's broad construction of the user fee statute.

In *Long Run,* the Kentucky Court of Appeals addressed the constitutionality of a "service charge" assessed by Louisville and Jefferson County Metropolitan Sewer District ("MSD"). The charge was imposed by MSD against all *property* within a designated "surface drainage improvement area" to fund storm water drainage improvements.[50] The charge was imposed as a flat amount per month for single and two-family residences and a flat amount based on square footage of impervious surface for commercial and industrial property.

The court identified the issue to be whether MSD's charge was an unlawful tax. MSD's enabling statutes prohibited MSD from imposing taxes (KRS § 76.140), but expressly authorized MSD to "establish a schedule of *rates, rentals and charges*, to be collected from all the *real property* within the district area *served by the facilities of the district.*"[51] Appellant property owners argued that the service charge was a "tax in

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[48] 932 S.W.2d 374 (Ky. 1996).
[49] R. 251-52 (Op. at 5-6).
[50] 775 S.W.2d at 522.
[51] *Id.* at 522 (quoting KRS § 76.090)(emphasis in original). The statute then, as now, set forth parameters for any schedule of rates, rental and charges imposed:

disguise" because unlike sewer services, the benefits derived from storm water drainage facilities "are incapable of measurement" and "any benefit from the drainage system is an indirect benefit, similar to the indirect benefit citizens receive from fire protection."[52] Appellants further claimed that some property owners receive no benefit at all.

The *Long Run* Court rejected these claims and found the drainage service charge imposed pursuant to KRS § 76.090 constitutional based on principles supporting special assessments, not user fees. A special assessment is a recognized type of local exaction used to finance local improvements (e.g., street, sidewalk, or streetlight improvements).[53] Special assessments are premised on benefits received, not services used. As explained by Kentucky's highest court, "[t]he theory upon which special taxes [assessments] are sustained is that the *property assessed* receives special benefits *in addition to* those received by the community at large."[54] The *Long Run* Court found the charge to be within the language of KRS § 76.090 because "Chapter 76 gives MSD broad powers to

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> The schedule may be based upon either:
> (a) The consumption of water on premises connected with the facilities, taking into consideration commercial and industrial use of water; or
> (b) The number and kind of plumbing fixtures connected with the facilities; or
> (c) The number of persons served by the facilities; or
> (d) May be determined by the district on any other basis or classification which the district determines to be fair and reasonable, whether similar or dissimilar to those enumerated, except that the schedule shall be uniform for all residential property; or
> (e) Any combination thereof.
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> This schedule may include additional charges for treatment of sewage, with a surcharge where the sewage contains industrial wastes or other wastes in excess of limitations established by regulations of the district.

KRS §76.090(1).

[52] *Long Run*, 775 S.W.2d at 522.

[53] KRS §§ 107.020(8), 107.140, 91A.210(2) and (3); *Krumpleman*, 314 S.W.2d at 561.

[54] Owensboro v. Sweeney, 111 S.W. 364, 365-66 (Ky. 1908)(emphasis added).

charge for services rendered in regard to wastewater, sewer, and storm water drainage facilities ... [and] MSD's facilities *serve to benefit all property* owners in the district."[55] The Court quoted with approval a finding in *Curtis v. Louisville and Jefferson County Metropolitan Sewer District* that "any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area ...."[56] *Curtis* rejected a prior challenge to MSD's enabling statute and expressly premised its finding on case law involving street improvement assessments.[57]

In *Kentucky River Authority* the Court addressed an appeal from a lower court holding that the Authority was "constitutionally precluded" from collecting "water use fees" from the City of Danville because the City received no benefit from the Authority.[58] The Kentucky River Authority was not a taxing district, but its enabling statute, KRS § 151.720, expressly authorized the Authority to collect "water use fees from all *facilities using water* from" the Kentucky River or its tributaries.[59] The Authority's regulations then, as now, imposed a "Tier I fee" and a "Tier II fee" as a fixed amount per 1,000 gallons on any "person who withdraws surface or groundwater from the Kentucky River

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[55] 775 S.W.2d at 524 (emphasis added).
[56] *Id.* (quoting *Curtis v. Louisville and Jefferson County Metropolitan Sewer District*, 311 S.W.2d 378, 382 (Ky. 1958)).
[57] *Curtis*, 311 S.W.2d at 382 (citing three cases involving special assessments for street improvements: *City of Louisville v. Bitzer*, 73 S.W. 1115 (Ky. 1903); *Nevin v. Roach*, 5 S.W. 546 (Ky. 1887); and *Preston v. Rudd*, 84 Ky. 150 (1886)).
[58] *Kentucky River Auth.*, 932 S.W.2d at 376.
[59] *See* KRS § 151.720(5) (1992), 1992 Ky. Acts ch. 453, sec. 1 (eff. July 14, 1992)("The Kentucky River Authority is authorized and empowered to: . . . (5) Issue revenue bonds, in accordance with KRS 151.730, payable from fees collected from all facilities *using water* from the Kentucky River or its tributaries . . . .")(emphasis added). A copy of this statute is attached hereto as Exhibit B.

basin" and any "person who withdraws surface water from the mainstem of the Kentucky River."[60]

The Authority sought to impose its water use fees on the City of Danville, which withdrew water and therefore was using water from tributaries of the Kentucky River. The City claimed it realized no benefit from the Authority's projects and the imposition of the fee constituted an uncompensated taking.

The Court explained that "assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process."[61] The Court noted that "[t]he parties have continually debated whether the fees assessed by the Authority are special assessments, taxes, or user fees"[62] but did not resolve this debate or specifically classify the Authority's charges. Instead, the Court analyzed whether there was the appropriate relationship under any classification. The Court recognized the presence of a specific and particular relationship to support a *user fee* by finding "[t]he fee in this case is based upon the ***actual use*** by the city of the Kentucky River water basin."[63] The Court similarly recognized the presence of a relationship to support a special assessment. Citing *Curtis*, the Court recognized that Danville's property accrued a general benefit from the projects of the Authority.

The Circuit Court erred in finding that either *Long Run* or *Kentucky River Authority* inform the meaning or scope of KRS §§ 91A.510-.530 or support interpreting the term "use" to mean something other than actual use. The charges at issue in *Long*

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[60] *See* 420 KAR 1:040 (Tier I water use fees) and 420 KAR 1:050 (Tier II water use fees).
[61] *Id.* at 376.
[62] *Id.* at 376.
[63] *Id.* at 377.

Run and *Kentucky River* were authorized by KRS § 76.090 and KRS § 151.720, respectively, and the user fee statutes were not implicated in either case. Moreover, the statutes at issue in those cases differed substantially from the user fee statutes, authorizing collection of charges on "facilities" (KRS § 157.621) or "real property" (KRS § 76.090) as opposed to "users" of a service as required by the user fee statutes (KRS § 91A.510).

Long Run and *Kentucky River Authority* are also distinguishable because they addressed *constitutional* limitations on exactions, not *statutory* limitations. To the extent these cases inform local authority to impose exactions; the Circuit Court misapplied their discussion of special assessment law to user fees. Neither case holds that "use" for purposes of a user fee means anything other than actual use. Indeed, the fee at issue in *Kentucky River Authority* was imposed on actual use.

In reading *Long Run* and *Kentucky River Authority*, the Circuit Court applied an over-expansive interpretation of *Curtis*.[64] *Curtis* is a special assessment case and does not support and was not quoted in either *Long Run* or *Kentucky River Authority* to support imposing a user fee on anyone other than a "user" for "the use of" a service. The Circuit Court misread the *Long Run* and *Kentucky River Authority* courts' quote from *Curtis* as relating to user fees, not special assessments. *Curtis* was a special assessment case and recognized that a special assessment is valid and not a violation of due process provided the assessment funds improvements that benefit the property charged.[65]

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[64] R. at 252 (Op. at 6).

[65] *See Curtis*, 311 S.W.2d 378 (upholding an assessment to fund surface drainage improvements as valid special assessment against all benefited properties).

The Property Charge at issue is not a special assessment as in *Long Run* nor is it imposed on the actual use of a governmental service as in *Kentucky River Authority*. The Circuit Court improperly applied these cases and the characteristics of a "special assessment" to a user fee, and therefore, the Circuit Court must be reversed.

D. The Circuit Court Misapplied Federal Case Law

The Circuit Court also misapplied the holding in *United States v. Sperry Corp.*[66] in further support for its over-expansive definition of "user fee".[67] In *Sperry*, the U.S. Supreme Court considered the validity of a fee imposed for the *use* of the Iran-United States Claims Tribunal and withheld the fee from any award made by that Tribunal. Pursuant to the Algiers Accords and several executive orders, any claim against the government of Iran by a citizen of the United States resulting from the seizure of the U.S. Embassy in Tehran was required to be submitted to the Iran-United States Claims Tribunal. As part of the Accords, the U.S. established a "Security Account" from which to pay all successful claims against Iran. The Department of the Treasury issued a directive requiring that a 2% fee be deducted from each award certified by the tribunal to reimburse the U.S. for expenses associated with the Tribunal (the fee was later reduced to 1.5%). Sperry submitted a claim to the Tribunal against Iran. After submitting the claim, Sperry and Iran reached a settlement, which was submitted to the Tribunal. The Tribunal entered the award and made payment from its Security Account. The Tribunal withheld the 2% charge as required by statute, and Sperry challenged the charge as unconstitutional.

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[66] 493 U.S. 52 (1989).
[67] R. at 253 (Op. at 7).

The Supreme Court upheld the charge as a valid user fee because the charge was related to the *use* of the Tribunal. The fee was actually deducted from the award paid by the Tribunal from the Security Account.[68] The Court found that the fee was valid because it was imposed on those who "*specifically* benefited from [the Tribunal's] services..."[69] Because Sperry actually used the Tribunal and was paid from the Security Account the fee was declared valid.

The *Sperry* case stands for the clear proposition that a user fee is valid where there is an actual use of the service by the payor. Ignoring the Supreme Court's holding, the Circuit Court relied upon dicta in the Court's opinion.[70] The *Sperry* Court stated that "Sperry may be required to pay a charge for the availability of the Tribunal even if it never used the Tribunal... [because] the services are available for its use."[71] That language constitutes dicta and is irrelevant to the instant case. Furthermore, that language is irrelevant in the present case because *Sperry* was not interpreting Kentucky law; specifically the Court did not consider the Kentucky statutory definition of a user fee under KRS § 91A.510 specifically requiring use of the service. Therefore, the discussion in *Sperry* relating to charges for general benefits is irrelevant in the present case.

After improperly relying on dicta from *Sperry*, the Circuit Court improperly disregarded clear precedent set in *Massachusetts v. United States*.[72] In *Massachusetts*, the U.S. Supreme Court considered the validity of an annual flat fee imposed on all civil

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[68] *Id.* at 57 (noting that "the Department of the Treasury issued a 'Directive License' requiring the Federal Reserve Bank of New York to deduct 2% from each award certified by the Tribunal and to pay the deducted amount into the Treasury. . . ").
[69] *Id.* at 63 (Quoting *Massachusetts v. United States,* 435 U.S. 444 (1978))(emphasis added).
[70] R. at 253 (Op. at 7).
[71] *Id.* (quoting *Massachusetts*, 435 U.S. 444).
[72] R. at 254 (Op. at 8, fn. 24). 435 U.S. 444 (1978).

aircraft that actually fly in and use the navigable airspace of the United States.[73] The funds collected were used by the federal government to develop facilities and services designed to benefit those aircraft flying in the navigable airspace.[74] The fee was imposed by Congress to ensure aircraft owners "pay for their fair share of ***the use*** of the airway facilities…"[75] Massachusetts owned several aircraft that actually used the navigable airspace for patrolling highways and other police functions.[76] Massachusetts argued the fee violated state immunity from federal taxes.[77] The Court determined that the fees were user fees that did not implicate state immunity and that such fees were valid because they "are based upon some fair approximation of *use*…"[78] Because the aircraft assessed actually *used* the navigable airspace, they received *direct* benefits from the services provided by the government.[79] The Court noted that the fee is valid even when imposed against an aircraft that never specifically used the services because "the federal services are directed at the entire navigable airspace of the United States" and that *users* of the air space could be subject to the fee.[80] Therefore, the Court found that because the aircraft actually used the services the fee was a valid user fee.[81]

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[73] *Id.* at 449.
[74] *Id.* at 446-447. The fee was used to fund aircraft operations during takeoffs and landings at … larger airports; provide navigation and other assistance to all categories of aircraft after takeoff and prior to landing; and miscellaneous services such as filing flight plans, weather information, and rescue operations. *Id.* at 447, fn. 2.
[75] Id. at 452 (quoting H.R. Rep. 91-601, p. 46 and citing see S. Rep. 91-706, pp. 17-18).
[76] *Id.* at 452.
[77] *Id,* at 452-53.
[78] *Id.* at 464 (emphasis added).
[79] *Id.* at 468-69.
[80] *Id.* at 468 and fn. 23 (emphasis added).
[81] *Id.* at 469.

The Circuit Court improperly found that the *Massachusetts* opinion "depends on a narrow definition of use, which the [Circuit] Court has rejected."[82] Quixotically, the Circuit Court found that the *Long Run* decision addressing *special assessments* held more value than U.S. Supreme Court precedent addressing *user fees*.[83] The Circuit Court's rejection of the definition of a user fee as set forth in *Massachusetts* is clearly erroneous. Furthermore, the Circuit Court misapplied the precedent established in *Sperry*. Therefore, the Opinion of the Circuit Court is erroneous and must be reversed.

E. The Property Charge is an Invalid Tax Rather Than a Valid User Fee

The Circuit Court erroneously held there is a relationship between the Property Charge and 911 Service sufficient to validate the fee. The Circuit Court correctly stated that to be a valid user fee there must be a "relationship between the charge itself and the benefit received by the payor." [84] However, the Circuit Court improperly analyzed the *amount* of the fee and upon whom it is imposed.[85] The Circuit Court failed to demonstrate that there was a direct relationship between the Property Charge itself and the service provided to the payor.

Kentucky's highest court has previously recognized that where a charge is imposed and the benefit derived by the payor is the same as the general benefit derived by others, the charge is properly classified a tax. This Court's precedent holds, "[a] tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." [86] Unlike fees, "[t]axes are a means for the government to raise general revenue without regard to direct benefits which may

[82] R. 254 (Op. at p. 8, fn. 24).
[83] *Id.* (Op. at 8).
[84] *Id.*
[85] *Id.* at 254-55 (Op. at 8-9).
[86] *Long Run* 775 S.W.2d at 522.

inure to the payor or to the property taxed." [87] "[A] 'tax' in the strict sense of monies levied to meet the general expenses of government has been distinguished in a variety of contexts from more particularized exactions, such as fines, user fees—tolls, for example—infrastructure assessments, or regulatory fees...."[88] "The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. On the other hand, a fee is generally regarded as a charge for some particular service."[89] The general cost of government and the provision of a general benefit to the public is properly funded by the imposition of a tax; any "user fee" imposed to fund such a service is truly an invalid tax.[90]

The common characteristic of cases upholding charges as lawful fees is the presence of a specific and particular nexus between the imposition of the fee and the payor's actual usage of the service funded by the user fee. Absent that direct nexus, Kentucky cases consistently hold the charge to be a tax. A flat fee imposed on each occupied unit in the County does not bear a direct relationship to the benefit received by the payor. As discussed above, the payor may not receive any benefit in the absence of a

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[87] *Kentucky River Auth.*, 932 S.W.2d at 376 (citing *Krumpelman v. Louisville & Jefferson County Metropolitan Dist.*, 314 S.W.2d 557, 561 (Ky. App. 1958)).
[88] *Klein v. Flanery*, 439 S.W.3d 107, 114 fn. 6 (Ky. 2014).
[89] *Dickson v. Jefferson County Bd. of Educ.*, 225 S.W.2d 672 (Ky. 1949)(quotations omitted).
[90] *Barber v. Commissioner of Revenue*, 674 S.W.2d 18, 21 (Ky. App. 1984)("We conclude that the constitution and statutes intend for governmental services... to be shared equally and equitably by all in the community who own property. The proper way is to charge all real and personal property to be benefited by the fire protection with a rate times the assessed value of the property.").

landline telephone service, and at best they would enjoy an *indirect* benefit. The ownership or occupation of real property has no direct relationship to 911 emergency telephone services. Therefore, the Circuit Court erroneously found the Property Charge to be valid and must be reversed.

F. The Circuit Court's Decision Circumvents the Political Process

The Circuit Court's decision applies an over-expansive definition of "user fee" and allows County officials to avoid political accountability for what is actually a tax (albeit an illegal one at this juncture). Additionally, the decision permits the Fiscal Court to create "user fees" to fund any and all government services and programs and impose them on residents under the theory the program and services provide indirect benefits or make services generally available to the payor.

Where there is no direct relationship between the service provided and the fee charged, the proper method of funding is revenue-raising taxation. A revenue-raising tax is "universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." [91] However, "taxation" is politically undesirable and a "user fee" may be more palatable to elected officials. The Circuit Court has created a method by which a county may fund its services without resorting to raising taxes, thereby avoiding public scrutiny and accountability. This method also improperly circumvents the requirements imposed by the Kentucky Constitution and statutes put in place to protect taxpayers in this state.[92]

To prevent the shirking of political accountability and to avoid user fees, the Kentucky General Assembly carefully has limited valid user fees to those imposed on the

[91] *Long Run*, 775 S.W.2d at 522. *See also, Krumpelman*, 314 S.W.2d at 561.
[92] *See, i.e.* Ky. Const. §§ 171 (requiring uniformity in taxation) and 181 (limiting the methods of taxation by a municipality).

actual use of a service that has a direct relationship to the fee.[93] The Circuit Court's decision would allow counties to avoid these requirements, and, in turn, exceed their authority. Accordingly, this Court must reverse the Circuit Court and find the Ordinance void.

III. CONCLUSION

The Circuit Court erroneously upheld the Property Charge as a valid user fee by using an over-expansive definition of "user fee", improperly applying principles related to special assessments and improperly disregarding applicable precedent squarely on point. The Property Charge imposed by the County in the Ordinance is not authorized by KRS § 65.760 because it "conflicts with the Constitution and statutes of this state." The Property Charge fails to meet the statutory and case law requirements of a user fee. The Property Charge is imposed irrespective of use of the 911 Service by the payor. The owners of occupied residential and commercial units receive no greater benefit from 911 services than any member of the community at large. The County's attempt to impose the Property Charge with no direct relationship to the service provided is unlawful.

For the reasons set forth herein, the Appellants' request this Court reverse the judgment of the Circuit Court and declare the Property Charge and the Ordinance unlawful, unconstitutional, and void *ab initio*.

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[93] Other counties have observed this restriction and enacted lawful ordinances to fund 911 Service. "Examples include the ambulance and hospital fees of Cumberland County, the addressing fees of Shelby County, and the alarm panel monitoring fees of Boyd and Laurel Counties. Dispatch fees from responder agencies are used by Carter, Greenup, and Todd Counties. Oldham County charges a fee to the responder agencies to offset some equipment costs." Kentucky Legislative Research Commission, Program Review and Investigations Committee, Research Report No. 383, 911 Services and Funding: Accountability and Financial Information Should Be Improved, p. 38 (December 8, 2011)(available at http://www.lrc.ky.gov/lrcpubs/rr383.pdf). *See, i.e.*, Shelby County Ordinance No. 08-04-14, Series 2009 (requiring payment of a user fee to the E-911 coordinator to obtain a street address in the county)(Exhibit C).

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APPENDIX

Exhibit	Document	Record Cite
Exhibit A	Order of the Campbell Circuit Court dated June 6, 2014	R. at 247-257
Exhibit B	KRS § 151.720(5) (1992)	KRE 201
Exhibit C	Shelby County Ordinance No. 08-04-14, Series 2009	KRE 201